YALE

LAW JOURNAL

Vol. XX DECEMBER, 1910 No. 2

LEGISLATIVE POWERS THAT MAY NOT BE DELEGATED

Hon. J. B. Whitfield, Chief Justice of the Supreme Court of Florida.

One of the established maxims of the law is, that those to whom a power to exercise authority has been given may not delegate it to others unless the right to delegate the power is also conferred. This legal principle is based upon the existence of authority or privilege in one who confers upon another the power to exercise such authority or privilege, or the delegation of authority possessed by a large body to individuals of that body, and the right and implied intention of those who confer a power to have it exercised only by the ones to whom it is primarily delegated. But authority to delegate conferred power may be given expressly or by implication. The exercise of assumed power by those to whom it is not legally delegated is not in general of binding effect. These principles may apply to legislatures as to other bodies.[1]

Under our constitutional system all governmental authority is inherent in the people. The theory is the harmonious co-operation of independent departments having separate and distinct delegated powers to make, to apply and to enforce laws, subject to the Constitution adopted by the people as the governmental chart. In deference to the principle above stated sovereign powers conferred

[1] 7 A. & E. Ann. Cas., 737.

by the people should in general be exercised only by those to whom such powers are respectively assigned, unless authority to delegate the power is expressly or impliedly given by the people who confer the primary power. But a mere implication of non-delegation is not raised to the detriment of the general welfare. Immemorial usage and the necessities of local government justify the delegation of some minor legislative power of a police nature within definite limitations to municipalities where express organic provisions do not forbid.[2] Congress may confer limited and defined legislative powers upon the territories for local purposes.[3]

The Constitution of the United States provides that "All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives."

In slightly varying terms the constitution of perhaps every State in the Union provides that the powers of the State government shall be divided into three departments—legislative, executive, and judicial; that the legislative authority shall be vested in the legislature; that the executive authority shall be vested in a Governor; that the judicial power shall be vested in the members of the judiciary; and that no person belonging to one department shall exercise any powers appertaining to either of the other departments except as otherwise specified in the constitution. In effect, the State constitutions, as a general rule, provide that except as otherwise specified the exclusively legislative powers shall be exercised by the legislature and not by the Governor or the judiciary; that the exclusively executive powers shall be exercised by the Governor and not by the members of the Legislature or the judiciary; and that the exclusively judicial powers shall be exercised by members of the judiciary and not by the Governor or by members of the legislature. Particular cases may be governed by exceptional organic provisions.

The division of sovereign powers into departments was intended to enhance the efficiency of the Government, and the division embraces only such powers and to such an extent as is essential to efficient governmental action for the general welfare. In forbidding the exercise of any of the powers assigned to one department by any person belonging to another department, it was designed to secure to the departments independence of each other

[2] 60 Conn., 97; 129 U. S., 141; 113 Wis., 15.
[3] 22 Pac., 159; 114 U. S., 429.

and to prevent encroachments by any one department upon the powers exclusively assigned to another. There is no express provision that the powers given to each department shall not be delegated, but the application of the principle that powers cannot be delegated by those upon whom they are conferred, is generally warranted by the nature of the powers, the terms used and the object designed to be accomplished.

The differences between the powers of Congress and of the legislatures of the states under controlling constitutions probably do not affect the application of the principle of law *raised by implication* that forbids the delegation of legislative powers, unless the authority so to do appears by express or implied provisions of the organic law. Differences in organic law may control. The Constitution of the United States does not expressly provide that the powers assigned to one department shall not be exercised by officials of another department and some of the State constitutions may not contain such a provision. This fact and existing governmental necessities may explain such cases as 7 Wendell, 541; 10 Wheat., 1; 7 Cr., 382; 17 Wis., 703, and other cases where implications were not indulged. As the purpose of the constitution is to confer exclusively upon the legislative body the essentially legislative powers of the government, the chief difficulties in a given case of alleged illegal delegation of power are to determine what are the powers that are by express or implied provisions of the constitution exclusively assigned to the legislature, and whether any material portion of those powers have in fact been delegated *in violation of the organic law.* Whether a legislative power granted to Congress by the Federal constitution has been illegally delegated must be determined by that organic law. Whether a legislative power of a State has been delegated in violation of organic law should be determined by reference to the State constitution and rules of procedure, as the Federal constitution does not control the mere assignment of governmental powers by the State, at least when all the powers of one department are not conferred upon those exercising the powers of another department of the Government, or the powers conferred do not in effect impair rights that are secured by the Federal constitution.[4] A judicial determination that a statute is inoperative because it purports to delegate legislative power is justified only when it clearly appears beyond a

[4] 214 U. S., 91; 47 South. Rep., 969.

reasonable doubt that the duty imposed or the authority conferred appertains exclusively to the legislative department, and that the delegation is in conflict with the organic law. The reasonable requirements of the public welfare may justify a delegated authority when organic law is not clearly violated. In applying the provisions of a constitution the guiding star should be to effectuate its primary purpose, viz.: the welfare of the people in the preservation and exercise of the appropriate rights of sovereignty and of individuals. The division of governmental powers into legislative, executive, and judicial, is abstract and general, and is intended for practical purposes. There has been no complete and definite designation by a paramount authority of the powers that appertain to each of the three great governmental departments. Perhaps there cannot be an absolute separation of all the powers of a practical government. The object in dividing sovereign powers into separate departments being to enhance the efficiency of government, the division does not contemplate that mere administrative or ministerial authority, functions or duties, not involving real *powers* that are essentially legislative, executive or judicial, shall be performed *exclusively* by persons belonging to any one of the three great departments of government.[5] This is so even though the performance of administrative or ministerial authority, functions, or duties, involves the exercise of some discretion and judgment, and is essential to the effectiveness or the enforcement of a particular legislative, executive or judicial power. All the governmental powers are made effective through or by the aid of administrative or ministerial officers or individuals. To require functions that are not purely legislative, executive or judicial *powers* to be performed exclusively by any one department would at least curtail the efficiency of government to the detriment of the public good, and such a purpose could not have been designed in making a divison of the *powers*. Statutes authorizing courts to prescribe mere rules of procedure are not regarded as a delegation of an exclusive legislative power, since the courts may have inherent power to prescribe such rules when they do not conflict with law.[6] The ascertainment or determination within stated limitations of facts upon which valid statutes may by their own terms become effective or operative may in its nature be administrative or ministerial, or even quasi-judicial.

[5] 100 Pac., 179.

[6] 83 N. E., 351.

Such a function does not necessarily require the exercise of a legislative power; and the mere assignment of powers to the legislative department does not require the exclusive performance by the legislature of functions that are not really or necessarily law-making powers.

The governmental powers that are assigned exclusively to the legislative department are those designated by the constitution and such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, judgment and discretion in declaring what the law shall be, subject not to the control of another department, but only to the limitations of the organic law of the land. Legislative power includes, but may not be confined to, law-making power. A legislature is usually the exclusive law-making power, but it generally has other powers, authority or duties that are not exclusively legislative in their nature. The law-making power must be exercised solely by the legislature, but other powers or authority may be delegated unless forbidden by express or implied provisions or principles of organic law.[7] The essentially legislative functions of the law-making power include the right and duty to determine the subject, character and extent of governmental regulations, to create offices, to impose governmental burdens and to declare what the law shall be—to prescribe at least in definite general terms what offices shall exist, what burdens shall be imposed, what rules of conduct and procedure shall be observed, and what consequences shall follow violations of the law. These functions involve the exercise of primary and independent judgment and discretion by the law-making power. The product of the lawful exercise of the law-making power—the statute—is subject only to the applicable provisions and principles of the Federal and State constitutions. Enacted laws govern all the departments within organic limitations. It is the general law-making power that the constitution assigns exclusively to the legislative department of the government. It is this law-making power that the executive and the judiciary are forbidden to exercise. The principle of non-delegation of governmental powers based on implication and assumed intention should have no broader effect. The application of the principle should be flexible and dictated by reason so as to meet the necessities of effective government subject only to organic law. Provisions expressly forbidding the

[7] 10 Wheat., 1; 65 S. E. Rep., 665.

delegation of powers stand for themselves. In Cooley's *Constitutional Limitations,* it is well said that "One of the settled maxims of constitutional law is, that the power conferred upon the legislature *to make laws* cannot be delegated." [8] There are rules of conduct and even of procedure that persons are required by law to observe or submit to, which are not the result of the direct exercise of legislative power, and consequently not essentially laws, such as municipal ordinances designed for the purpose of making effective within stated limitations a subordinate governmental agency, and rules and regulations prescribed by competent authority for judicial procedure or for carrying into effect a law which in general terms covers the subject and defines the limits of subordinate action. The ordinances and rules and regulations, if valid, may within their proper sphere be as binding and effective as are statutory laws; but besides being controlled by organic law, such ordinances, rules and regulations must be within statutory grants and limitations and subject to judicial review as to their reasonableness, fairness and impartiality. Authority within stated limits to ascertain designated facts upon which a duly enacted statute takes effect or operates is not exclusively a legislative power. Such authority may be exercised by others than the legislative department if it is properly conferred and is exercised within prescribed legal limits.[9] Statutes conferring governmental authority should not be declared inoperative as an unwarranted delegation of power unless it is clear that provisions of the constitution have been violated. Legislative enactments are subject only to the constitution.

There is no unconstitutional delegation of legislative powers where statutes within definite legal limits give authority to municipalities to adopt ordinances of a police nature for their local purposes,[10] or to courts to make rules of judicial procedure or to ascertain particular facts,[11] or to administrative officers or boards to locate public institutions,[12] or to fix fees within definite limitations,[13] or to ascertain facts,[14] or to make just and reasonable

[8] 7th Ed., page 163.

[9] 8 Cyc., 830.

[10] 8 Cyc., 839; 99 Pac., 1059; 74 Atl., 581.

[11] 113 Wis., 398; 19 Fla., 175.

[12] 50 Fla., 293.

[13] 212 Mo., 616.

[14] 64 Miss., 59; 26 Wis., 291.

rates, rules and regulations for the duties of common carriers,[15] gas companies,[16] water companies,[17] telephones,[18] boards of health,[19] school boards,[20] examining boards,[21] and other public matters.[22] For an extreme case, see 52 So., 941.

But when authority is legally conferred upon stated officials or persons to ascertain or determine some matter or to define some regulation upon which a statute by its own terms operates for its complete effectiveness, the acts or proceedings under the authority are in general subject to judicial review and must be within prescribed limits, must not be so arbitrary or so unreasonable or unjust as to injure individual rights and must not violate any applicable provision or principle of law.[23]

The legislature may not delegate authority to amend a law,[24] or to create an office,[25] or to prescribe rules of law,[26] or to define a crime,[27] or a penalty,[28] or to fix without restrictions a license tax,[29] or to adopt a standard insurance policy contract,[30] or to designate the subjects of regulation,[31] or to control without limit the issue of stock by corporations,[32] or to change the rules of law.[33]

As a general rule the legislature may make the operation of a law depend upon a designated contingency, or may enact a law

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[15] 116 U. S., 307; 154 U. S., 362; 70 Ga., 694; 2 L. R. A., 504; 136 Wis., 160; 47 South. Rep., 969.

[16] 14 A. & E. Ann. Cas., 606.

[17] 107 Tenn., 647; 110 U. S., 347.

[18] 155 Fed., 554.

[19] 65 S. E., 387.

[20] 116 S. W., 561.

[21] 124 N. W., 167.

[22] 152 U. S., 211; 154 U. S., 362; 192 U. S., 470; 210 U. S., 281; 17 L. R. A. (N. S.), 821, 1,001; 172 Fed., 695; 72 Atl., 216; 7 L. R. A. (N. S.), 431. For an extreme case see 52 So., 941.

[23] 144 U. S., 677; 126 Fed., 823; 47 South., 969; 95 Wis., 390; 49 South, 39; 40 South., 875; 32 Am. St. Rep., 36; 3 L. R. A., 661.

[24] 9 Pac., 55.

[25] 24 L. R. A. (N. S.), 744.

[26] 134 Ala., 392.

[27] 146 Fed., 306.

[28] 88 Cal., 491.

[29] 154 Mo., 375.

[30] 31 L. R. A., 112.

[31] 111 S. W., 565.

[32] 10 L. R. A. (N. S.), 250.

[33] 65 Atl., 883; 56 S. E. 666.

containing general but definite terms designated to accomplish a lawful purpose, and may therein expressly authorize stated persons or officials within defined limits to ascertain facts upon which the law will by its own force become effective or operative, or to provide rules and regulations for the complete operation and enforcement of the statute within its express terms. This rule is of necessity generally recognized, for otherwise the legislature would be unable to completely exercise its law-making power, since it is practically impossible for a legislature by its own act to provide specifically and in detail for all the contingencies and conditions that may arise in the complex affairs of life.

But the legislature may not delegate the general law-making power and other specific powers that are by the constitution vested exclusively in the legislature. Power to determine primarily the subjects, character and extent of governmental regulations or burdens, or to enact or to amend a law, or to change the rules of law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law, or to create an office, may not be delegated by the legislature.[34]

J. B. Whitfield.

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[34] An address by Mr. Justice Timlin before the Wisconsin Bar Association in June, 1910, contains an admirable discussion of the "delegation of legislative power."